

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAN 9 2001

PATRICK FISHER
Clerk

LEE J. LEYBA,

Plaintiff-Appellant,

v.

ALEXIS HERMAN, Secretary, United
States Department of Labor,

Defendant-Appellee.

No. 00-2133
(D.C. No. CIV-99-261-M)
(D. N.M.)

ORDER AND JUDGMENT *

Before **BRORBY** , **KELLY** , and **LUCERO** , Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Appellant Lee J. Leyba, proceeding pro se, challenges the district court's grant of summary judgment to appellee, his former employer, on his claim of age discrimination.¹ The basis for appellant's suit was his employer's denial of a promotion to a supervisory position in favor of another, younger, candidate. Our jurisdiction over this appeal arises from 28 U.S.C. § 1291. We review the district court's grant of summary judgment de novo, applying the same standard as that court did pursuant to Fed. R. Civ. P. 56(c). *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir.), cert. denied, 120 S. Ct. 53 (1999).

On appeal, appellant argues with the district court's conclusion that, despite meeting the standards for a prima facie case of age discrimination, appellant had presented no admissible evidence demonstrating that appellee's reasons for hiring the successful candidate were a pretext for age discrimination. He contends that the affidavit supporting appellee's motion for summary judgment is itself inadmissible, and argues that he was the better qualified applicant. He alleges prior instances of discrimination by appellee, and concludes

¹ Appellant's complaint also set out claims of retaliation, hostile work environment and constructive discharge, and requested punitive damages against appellee. The district court ruled that these additional claims were unsupported and that the request for punitive damages was not authorized by law. Appellant does not challenge these rulings on appeal and has therefore waived the issues. *See State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994).

with unsupported allegations that judges and attorneys in New Mexico are biased against pro se litigants in federal court.

After careful review of the entire record on appeal in light of appellant's arguments, we conclude that the district court correctly decided this case.

Appellant's arguments misconstrue the district court's ruling and misunderstand the law applicable to his claims. Therefore, for substantially the same reasons given by the district court in its Memorandum Opinion and Order dated March 24, 2000, the judgment of the United States District Court for the District of New Mexico is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge